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Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

JOSEPH TOUSSAINT, et al.,
Petitioners,

VS.

DANIEL J. MCCARTHY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a 1976 Three Judge District Court partial summary judgment decision and order in this case that was summarily affirmed by this Court in 1978 and has not been reversed or overruled by this Court may be vacated by a panel of the Ninth Circuit based upon the panel's reading of recent decisions of this Court in other cases?

2. Whether the Ninth Circuit properly vacated and modified the District Court's permanent injunction imposing procedural safeguards against arbitrary, unjustifiable and unnecessary confinement in lock-up at California's maximum security prisons at San Quentin and Folsom, and limited such procedural safeguards to requiring defendants to hold an informal nonadversary

placement hearing within a reasonable time after the inmate is segregated, to inform the inmate of the charges against him or the reasons for considering segregation, to allow the inmate to present his views, to conduct periodic review of the inmate's segregation status, and to base the decision to place or retain an inmate in lock-up on "some evidence", where the district court had found, without appellate reversal, (1) that the inmates enjoy a state created "liberty interest" in being free of confinement in lock-up, (2) that conditions in defendants' lock-up units have long violated Eighth Amendment minima, (3) that defendants have systematically failed and refused to cure these unconstitutional lock-up conditions

and have retained inmates indeterminately in these unconstitutional lock-up conditions, frequently for years, (4) that defendants frequently place and retain inmates in the unconstitutional lock-up conditions unjustifiably and arbitrarily, on the basis of unreliable and undisclosed information, (5) that since 1976 the defendants have been subject to injunctions, affirmed by this Court or the Ninth Circuit, providing more substantial procedural protections for inmates than now required by the Ninth Circuit, and (6) that for a decade the defendants have persistently violated these injunctions which were designed to control unjustified, arbitrary and capricious placement and retention in lock-up?

LIST OF PARTIES

Plaintiffs-petitioners constitute a class of maximum security minimum privilege inmates in the custody of the Californis Department of Corrections (CDC) at the California State Prisons at San Quentin and Folsom (as well as at the California Training Facility at Soledad and the Dueul Vocational Institute (DVI)). The individual class representatives are Joseph Toussaint, Michael Cowans and Welve Johnson. Defendants-Respondants are Daniel McCarthy (Director, CDC), and the wardens and superintendents at the Prisons at San Quentin (Dan Vasquez) and at Folsom (Robert Borg) (as well as at Soledad (Alan A. Stagner) and DVI (Robert M. Rees).

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners (plaintiffs below) respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled prison conditions civil rights action.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 801 F.2d 1080. It is in the Appendix at 1. The Ninth Circuit's December 31, 1986 Order denying the plaintiffs' Petition for Rehearing Suggestion of Rehearing En Banc is unreported. It is in the Appendix at 585. That Court's Mandate and Judgment is in the Appendix at 586.

The principal decision and Judgment of the District Court giving rise to the instant proceedings is reported at 597 F.Supp. 1388. It is in the Appendix at 171. The Court's order denying defendants' Motion for New Trial is in the Appendix at 357.

The District Court Monitor's Sixth Review Memorandum and Order of March 19, 1985 (In Re Altamirano) is not reported.

It is in the Appendix at 383. The Monitor's Memorandum and Order Denying Request to Withdraw Sixth Review Memorandum (March 25, 1985) is not reported. It is in the Appendix at 376. The District Court's Minute Order of April 11, 1985 denying the Motion to review the Monitor's decision is not reported. Both it and an excerpt of the transcript of relevant proceedings are in the Appendix at 357. The Ninth Circuit's April 17, 1985 Order staying the Monitor's Sixth Review Memorandum, pending further briefing is in the Appendix at 370. The Ninth Circuit's May 22, 1985 Order vacating the stay in all but one respect is in the Appendix at 367. Mr. Justice Rehnquist's May 24, 1985 Order granting stay pending response is in the Appendix at 365. Justice

Rehnquist's June 4, 1985 Order vacating the stay is in the Appendix at 364.

The Monitor's April 11, 1985 Order Releasing Inmates from Segregation is not reported. It is included in the Appendix at 372. The District Court's June 13, 1985 Order affirming the above described order in all but one respect is in the Appendix at 362. The District Court's June 27, 1985 Order denying defendants' motion for reconsideration is in the Appendix at 359. The Ninth Circuit's Order granting a Stay of the District Court's June 13, 1985 Order is in the Appendix at 358.

The Three-Judge District Court's 1976 Opinion granting partial summary judgment and issuing an injunction is reported at 462 F.Supp. 397. It is in the Appendix at 549. The 1978 decision of this Court (over jurisdictional

grounds dissent of Justice Rehnquist, J. and Burger, CJ.) is reported at 434 U.S. 1052. It is in the Appendix at 540.

The District Court's 1983 Decision issuing a preliminary injunction is reported at 553 F.Supp. 1365. It is in the Appendix at 435. The Ninth Circuit's 1984 decision, affirming the preliminary injunction in all but one respect, is reported at 722 F.2d 1490. It is in the Appendix at 408.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 30, 1986, affirming in part, reversing in part, vacating in part and modifying in part, judgments and Orders of the United States District Court for the Northern District of California dated September 30, 1976,

January 14, 1983, October 18, 1984, April 11, 1985 and June 13, 1985, as well as other Orders derivative of these. Plaintiffs' timely Petition for Rehearing and Suggestion of Rehearing En Banc was denied on December 31, 1986. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States, and 42 U.S.C. Section 1983. These provisions are set forth in the Appendix at 587-588.

This case also involves certain provisions of California law, namely California Penal Code Sections 2931, 2933 and 15 Cal.Admin. Code Sections 3335, 3336, 3339. These provisions were included as appendices to the Ninth

Circuit's Opinion and are included in the Appendix hereto in that form at 147.

STATEMENT OF THE CASE

This Petition concerns approximately 2500 inmates at San Quentin and Folsom prisons who are confined in maximum security minimum privilege segregated housing units (lock-up). Plaintiff class members are isolated for long periods of time from the general prison population and spent an average of 22-1/2 hours per day locked in what the District Court recognized after trial as "dim, noisy, malodorous cubicle[s] the size of a dog kennel" with virtually nothing to do. See Toussaint v. McCarthy, 597 F.Supp.

1388, 1393 and 1403, quote at 1405-06 (N.D.Ca. 1984). (App. 171, 180-82, 233-35).[1/]

The instant lawsuit was filed in 1973. In 1976, a Three-Judge District Court entered partial summary judgment sustaining plaintiffs' due process claims. The Court ordered that a lock-up inmate must be afforded prompt written notice of the reasons for his lock-up confinement, an opportunity to prepare a defense, a fair and expeditious hearing at which to present evidence, representation by a counsel-substitute

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1/ Additional class members are held in lock-up units at Soledad and DVI. The trial leading to the instant appellate proceedings concerned conditions only at San Quentin and Folsom and resulted in a permanent injunction concerning only those institutions. The Ninth Circuit's decision, however, affects the Soledad and DVI members of the class, as that Court vacated or modified other injunctions that apply to all four prisons.

when appropriate, and a written decision. Wright v. Enomoto, supra, 462 F.Supp. at 404-05 (App. 581-583). That decision was summarily affirmed by this Court. 434 U.S. 1052 (1978) (App. 540) (Rehnquist, J and Burger, CJ dissenting on jurisdictional grounds).

The District Court subsequently issued a preliminary injunction addressing cruel and unusual conditions in lock-up and reaffirming and strengthening the Wright procedural safeguards. Toussaint v. Rushen, 553 F.Supp. 1365, 1386-87 (N.D. Cal. 1983) (App. 435, 532-538).[2/] The Court

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2/ Prior to this the District Court had issued a preliminary injunction on January 14, 1983 (CD 513) that was vacated by the Ninth Circuit on the grounds that in the Ninth Circuit's view the District Court had applied an incorrect legal standard, involving a

(Footnote Continued)

specifically found that the defendants had repeatedly violated the Wright requirements, continuing to place and retain prisoners arbitrarily and unjustifiably in lock-up. Id. at 1374-75 (App. 474-477). The Court identified a list of constitutional violations that resulted. Id. at 1374-76 (App. 474-483).

The preliminary injunction addressed particular conditions of confinement and articulated criteria and standards to be followed by the defendants in making lock-up decisions, limited the use of "confidential" information to support lock-up decisions, required annual review

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(Footnote Continued)

totality of circumstances approach, in framing its order. Wright v. Rushen, 642 F.2d 1129 (9th Cir. 1981). This preliminary injunction initially applied only to San Quentin, Soledad and DVI. On August 3, 1983 it was extended to Folsom as well. (CD 664).

of any retention in lock-up, and established an evidentiary standard for retention in lock-up on grounds of gang membership. 553 F.Supp. at 1386-87 (App. 532-538).

A panel of the Ninth Circuit affirmed the preliminary injunction, with one minor exception involving food service. Toussaint v. Yockey, 722 F.2d 1490 (9th Cir. 1984) (App. 408). The Ninth Circuit considered the impact of this Court's decision in Hewitt v. Helms, 459 U.S. 460 (1983), and reconfirmed the Wright Order. It also upheld the portions of the preliminary injunction requiring additional procedural safeguards for placement and retention in lock-up, stating that:

> The district court's order was a valid exercise of that court's power to effectuate the prior order of the three-judge court in Wright I. In fashioning a remedy for those violations the district court had

> the authority to go beyond earlier measures and enter a comprehensive order to insure against the risk of continued non-compliance. Yockey, 722 F.2d at 1494 (App. 425-427).

The Ninth Circuit's Yockey Panel observed that Hewitt "casts some doubt on the [district] court's conclusion that defendants' practices violate the fourteenth amendment...." Toussaint v. Yockey, supra, 722 F.2d at 1494, n. 6 (App. 426), and suggested that:

> in passing on plaintiffs' request for a permanent injunction the district court may wish to reconsider its evaluation of plaintiffs' procedural claims and, if necessary, decide whether the evidence continues to warrant imposition of the procedural requirements adopted to insure compliance with the Wright I court's injunction. Ibid. (App. 426-427).

Notwithstanding this observation, and citing Hutto v. Finney, 437 U.S. 678 (1978), the Ninth Circuit also recognized that the facts of this case might continue to warrant Wright I remedies or

even additional procedural safeguards. 722 F.2d at 1494 (App. 425-427).

At the time of trial, concluded eight years after the Wright order was entered by the District Court, the situation had changed at San Quentin and Folsom but only for the worse. Evaluating the evidence introduced in the two month trial, the District Court found that the physical conditions in the segregation units at Folsom and San Quentin -- ranging from double celling in tiny cells to lack of sanitation to lack of exercise -- constituted cruel and unusual punishment in numerous particulars. Toussaint v. McCarthy, supra, 597 F.Supp. at 1395-1405 (App. 190-246).

In its permanent injunction the District Court ordered the defendants to cure specified cruel and unusual conditions. The District Court also

carefully reconsidered the Wright and Toussaint v. Yockey lock-up placement and retention remedies within the context of this case, and then retained and amplified them. Toussaint v. McCarthy, 597 F.Supp. at 1415-18 (N.D. Cal. 1984) (App. 297-310). The Court also appointed a monitor as a special master under F.R. Civ. P., Rule 53, to oversee compliance. 597 F.Supp. at 1418-19 (App. 311-313).

Based on its review of all the evidence, the District Court concluded:

> If any facet of this case is more shocking than the physical conditions to which plaintiffs are subjected, it is the absolute capriciousness with which inmates are selected to suffer the grievous fate of assignment to segregation. 597 F.Supp. at 1415 (App. 297).

This conclusion was based on the facts proved at trial, that were not challenged by defendants on appeal nor disputed by the Ninth Circuit. These

facts showed irrational lock-up placement and retention decisions being made on the basis of information that is wholly lacking any indicia of reliability.

In particular, the Court found, inter alia, that inmates were in fact locked-up, often for years on end, without any rational basis or justification at all, that the defendants' lock-up decisions often were in the nature of self fulfilling prophesies, and that the "confidential" information the defendants relied on to make lock-up decisions was generally untrustworthy and unreliable. See 597 F.Supp. at 1407 and nn. 34 and 35 (App. 251-255), where the District Court provided a detailed explanation with illustrations of these facts.

In addition, on the basis of overwhelming evidence that prison

officials consistently refused to follow the District Court's prior orders, including the Wright and Toussaint v. Yockey injunctions governing lock-up procedures, the District Court found that the "prior order in Wright v. Enomoto has been consistently overlooked or disobeyed." 597 F.Supp. at 1418 (App. 310). Based upon all the evidence, the Court found that its prior orders to correct constitutional violations had not been effective. Id at 1418 (App. 310-311).[3/]

3/ On the same day the District Court entered its permanent injunction, it also entered a judgment of contempt for willful violation at Folsom of the double celling provisions of the preliminary injunction. Toussaint v. McCarthy, 597 F.Supp. 1427 (N.D.Cal. 1984) (contempt). No appeal was taken from the contempt judgment. A second contempt conviction was subsequently avoided when the defendants stipulated to an order ending involuntary double celling at Soledad and DVI. (CD 1718, February 4, 1985.)

Defendants did not challenge these findings on appeal.

In view of defendants' long-continuing constitutional violations, defendants' consistent pattern of arbitrary decision-making and the defendants' failure to obey court orders, the District Court concluded that it could have ordered the segregation units closed immediately. 597 F.Supp. at 1418 (App. 310). However, the Court decided that closing the lock-up units would unduly jeopardize prison security. Thus, it permitted the defendants to house inmates in lock-up at San Quentin and Folsom while correcting the unconstituional conditions. Id. at 1418, 1419 n. 52 (App. 309, 316). To insure that inmates are not unnecessarily subjected to these cruel and unusual conditions, the District Court determined

that, in the interim, it "must scrutinize the reasons assertedly justifying placement and retention of each inmate in segregation to ensure that they correspond to legitimate security considerations", and provided for the review of segregation decisions by its Monitor on this interim basis. Id. at 1418, 1425-26 (App. 309, 346-348).

Thus, in addition to ordering elimination of cruel and unusual conditions in the lock-up units, the District Court reaffirmed the Wright due process requirements. 597 F.Supp. at 1424 (App. 341-342). The District Court also mandated placement criteria and limited the use of confidential information to justify lock-up placement decisions. Id. at 1424-26 (App. 342-345). It also required at least annual review of any retention in

lock-up, pursuant to the same processes and standards for placement. Id. at 1424 (App. 343-344). Finally, it provided for review by its Monitor and the Court of all segregation decisions disputed by the inmate concerned. Id. at 1424-27 (App. 350-352).

The defendants appealed from only a few provisions of the permanent injunction directly concerning conditions of confinement.[4/] The defendants appealed generally from parts III and IV of the injunction, i.e., the lock-up placement and retention provisions of the

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4/ Defendants appealed from provisions involving control of hot water temperature in inmate showers, installation of sound absorbing materials, and law library-court access requirements as well as provisions, derived from the procedural safeguards, concerning programs for lock-up inmates.

permanent injunction.[5] 597 F.Supp. at 1424-1427 (App. 349-355). Plaintiffs cross appealed on a few points.[6]

In its September 30, 1986 decision, the Ninth Circuit held that in institutional or structural litigation the abuse of discretion standard of

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5/ The Defendants also appealed from several subsequent court orders that specific inmates be released from lock-up to the general population. These orders and relevant limited appellate stay orders are set forth in the Appendix hereto at 358-407. They are described, supra at 2-4. The Ninth Circuit's decision concerning the procedural safeguards provisions of the permanent injunction rendered moot or subsumed these additional appeals. See, infra.

6/ Plaintiffs cross appealed from the law library-court access provisons, from the conclusion that the medical care system at Folsom did not violate the Constitution, from the conclusion that denial of contact visiting to long term lock-up inmates does not violate the Constitution, and from the conclusion that in the context of this case enforced idleness of lock-up inmates does not violate the Constitution.

appellate review of a District Court's remedy was much relaxed "in favor of close appellate review." 801 F. 2d at 1089 (App. 20):

> We will scrutinize the injunction closely to make sure that the remedy protects the plaintiff's constitutional rights and does not require more of state officials than is necessary to assure their compliance with the constitution. Within these parameters, we will defer to the district court. 801 F.2d at 1089 (App. 23).

Applying this standard, the Ninth Circuit vacated the three judge district decision in this case, in Wright v. Enomoto, supra (App. 549-584), and vacated virtually all of the court mandated lock-up procedures, even though it found that the inmates enjoy a liberty interest in not being wrongly assigned to a lock-up unit. 801 F.2d at 1097-1098

(App. 62-68).[7] The Ninth Circuit held that the underpinnings of Wright had been eroded both (1) by this Court's recent decision in Hewitt v. Helms, 459 U.S. 460 (1983) and (2) because the California administrative regulation upon which Wright was based has been repealed.[8]

7/ The Ninth Circuit rejected defendants' appeal from provisions of the permanent injunction on correction of structural deficiencies, and law library-court access, rejected plaintiffs' cross appeal on contact visiting and enforced idleness, agreed with plaintiffs' cross appeal on law library-court access issues, and agreed in part with plaintiffs' cross appeal on the Folsom medical care system.

8/ The Ninth Circuit concluded that the Wright Court's holding that California had created a liberty interest in freedom from lock-up under 15 Cal.Admin. Code § 3330 is entitled to "no deference" because the regulation has been repealed. 801 F.2d at 1092 (App. 36). In their Petition for Rehearing and Suggestion of

(Footnote Continued)

In addressing the lock-up procedural protection issues, the Ninth Circuit also did not disturb the District Court's findings, inter alia, concerning the cruel and unusual conditions in the lock-up units or that defendants' lock-up assignment practices were arbitrary and often were based on wholly unreliable confidential information or that defendants' lock-up practices, procedures and decisions violated existing court orders. Moreover, it affirmed the

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(Footnote Continued)

Rehearing En Banc plaintiffs demonstrated that the operative requirements of Section 3330 remain in force. Plaintiffs' argument on this point in the Petition For Rehearing is included in Appendix hereto beginning at 590 (exclusive of appendices thereto). If a Writ of Ceriorari is issued, Plaintiffs would brief that point further, as well as other Ninth Circuit errors of California law bearing on plaintiffs' liberty interest in being free of lock-up.

District Court's formulation of appropriate standards to govern lock-up decisions. 801 F.2d at 1101-02 (App. 82-84).

Relying on Hewitt, the Ninth Circuit limited, however, the judicially mandated lock-up placement and retention remedy to requiring defendants to hold an informal nonadversary placement hearing within a reasonable time after the inmate is segregated, to inform the inmate of the charges against him or the reasons for considering segregation, to allow the inmate to present his views, and to conduct periodic review of an inmate's segregation status. The use of confidential information was specifically allowed. 801 F.2d at 1101 (App. 78-79). And relying on Superintendent Mass. Correctional Institution v. Hill, 472 U.S. ____, 86 L.Ed.2d 356 (1985) the

Ninth Circuit limited the standard of proof for and judicial review of lock-up decisions to "some evidence." 801 F.2d at 1105-06 (App. 99).

Plaintiffs filed a timely Petition for Rehearing Suggestion of Rehearing En Banc addressing the Ninth Circuit's decisions on lock-up procedures and remedies. That Petition was denied on December 31, 1986 (App. 585).

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Decision Raises Important Issues of "Law of the Case" and of the Significance of this Court's Summary Affirmances of Lower Court decisions, as The Ninth Circuit's Decision is in Direct Conflict with this Court's 1978 Summary Affirmance in this Case of the Three Judge District Court Wright Decision and Order, Which has Neither been Overruled Nor Questioned by this Court

In its September 30th decision, the Ninth Circuit held that the decision and order entered in Wright v. Enomoto, and

summarily affirmed by this Court, 462 F.Supp. 397 (D.Md. 1976) (three Judge), sum aff'd 422 U.S. 1052 (1978) is no longer valid, and therefore is not entitled to "law of the case" application. 801 F.2d 1190-93 (App. 26-40).

Although this Court is not bound by its own decisions summarily affirming lower court rulings, a summary affirmance of the judgment of the lower court settles the issues for the parties to that case. Fusari v. Steinberg, 419 U.S. 379, 391-92 (1975) (Burger, CJ concurring). More generally, it prevents any lower court from coming to the opposite conclusion in any other case on the issues presented and necessarily decided. Mandel v. Bradley, 432 U.S. 173, 176 (1977); Hicks v. Miranda, 422 U.S. 332, 342-343 (1975). Cf.

Whitehill v. Elkins, 258 F.Supp. 589, 598 (D.Md. 1966) (three Judge) (Sobeloff, CJ. concurring specially), rev'd 389 U.S. 54 (1967).

The summary affirmance at issue here was in the instant case. The defendants had appealed to this Court from the entire partial summary judgment and order of the Three-Judge District Court. Further, it appears from the dissent from this Court's summary affirmance that this Court reached the merits of the case. See Wright v. Enomoto, 434 U.S. 1052 (1978) (Rehnquist, J. and Burger, CJ. dissenting on jurisdictional grounds).

This Court's summary affirmance of Wright has not been overruled, nor has it ever been questioned by this Court. Indeed, in Hewitt v. Helms, 459 U.S. 460, 469 (1983), this Court explicitly acknowledged and did not overrule its

decision in Wright. See Toussaint v. McCarthy, 801 F.2d at 1092, n. 10 (App. 37-38).[9/] In these circumstances, the Ninth Circuit's actions in this case raise important issues involving the "law of the case" doctrine and the significance of this Court's summary affirmance decisions that warrant issuance of a Writ of Certiorari.

9/ Notably, eight members of the Supreme Court who considered Wright, including the two who dissented, were on the Court that issued Hewitt. Justice Rehnquist dissented on jurisdictional grounds from Wright and delivered the opinion of the Court in Hewitt. On June 4, 1985, acting as Circuit Justice, Justice Rehnquist denied defendants' request for a stay of the procedural safeguard provisions of the permanent injunction pending the instant appeal (App. 364).

II. The Ninth Circuit's Severe Limitation of the Procedural Protections the District Court May Require For Lock-up Inmates to those Specifically Mandate in Hewitt Raises Important Unresolved Questions of Law Concerning Such Protections and Conflicts With a Decision of the Eighth Circuit.

A. The Ninth Circuit's Decision in this Case Raises Important Issues of Law Not Resolved by this Court's Decisions in Hewitt and Hill.

The Ninth Circuit has created a per se rule that the quantum of due process required for administrative segregation, regardless of context, is limited to those protections specifically identified by this Court in Hewitt v. Helms, 459 U.S. 460 (1983). Yet, the facts and legal context of Hewitt (a pure Fourteenth Amendment Due Process case) are so markedly different from those involved in the instant case (an Eighth Amendment and Due Process case), that this Court should issue a Writ of

Certiorari to clarify application of Hewitt and its progeny.

Unlike many inmates here, Helms received notice of the reasons for his initial placement in segregation, less than 48 hours after his initial placement in segregation. Helms received a prompt hearing concerning his placement. There was no indication in the Hewitt record that Helms was illiterate or that the issues presented were particularly complex. Helms apparently had the right to present and to a degree to confront witnesses in the hearing that actually resulted in an adjudication of his guilt of the disciplinary offense and his sentencing to a term of segregation. And the Pennsylvania prison authorities, following the hearings in which it was decided to retain Helms in segregation, made adequate written statements of the

reasons for their decision. 459 U.S. at 464-466. Further, Hewitt focused on confinement of a prisoner in conditions resembling segregation for a total of 50 days, based on his suspected participation in specific acts of serious misconduct. Ibid.

By contrast with the circumstances in Hewitt, the instant case involves, for example, confinement of hundreds of inmates in segregation for extended periods (often exceeding two to five years) on the basis of unreliable and undisclosed information for reasons often vague or unspecified and unrelated to the conduct of the inmate. Also by contrast with Hewitt, the conditions of confinement in the lock-up units at San Quentin and Folsom have for more than a decade grossly violated the Eighth Amendment. Toussaint 597 F.Supp.

at 1393-1405, 1408-20 (App. 178-246, 257-323). Further, procedural safeguards established in this case more than a decade ago (and sustained by this Court) "have been consistently overlooked or disobeyed" by the defendants. 597 F.Supp. at 1418 (App. 310). The additional procedural protections imposed by the Toussaint preliminary injunction (and sustained by the Ninth Circuit) were also disobeyed. Id. at 1407-08. (App. 255-257) Even more significantly, the evidence at trial in this case made clear that the procedural protections imposed in Wright and the Toussaint preliminary injunction do not adequately protect against unjustifiable, arbitrary and capricious lock-up decisions, see id. at 1405-07, 1415-16, 1418 (App. 246-255, 297-298, 308-310).

Examples abound of continued violations of the District Court's orders by the time of trial. Inmates continued to be placed in lock-up without timely notice or hearing. 597 F.Supp. at 1406 (App. 251). The notice often was not "in sufficient detail to enable the prisoner to prepare a response or defense." Id. at 1406-07 (App. 251). The lock-up hearings tended to be perfunctory. Id. at 1407 (App. 251). Even if a determination was favorable to the prisoner, he might be retained in lock-up for substantial periods due to lack of cell space in general population. Id. at 1407 (App. 255). Thus, unjustified and arbitrary confinement in lock-up

remained commonplace. Id. at 1415-16 (App. 297-299).[10/]

Consideration of unconstitutional conditions in lock-up, duration of confinement in lock-up, a consistent pattern of unjustified and arbitrary lock-up decision making, and disobedience of court orders appear to remain relevant under Hewitt. See Hewitt v. Helms, 459 U.S. at 468; id. at 481 n. 4 (Stevens, J. dissenting). Plainly they are relevant under Hutto v. Finney,

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10/ Moreover, in postjudgment proceedings before the Monitor, where numerous inmates challenged their retention in lock-up, defendants' documents evidenced a continued pattern and practice of violating both the Wright injunction and the Toussaint injunctions. Consequently, for example, the Monitor reported to the District Court that the "important procedural deficiencies cited in the District Court's Finding of Fact, 597 F.Supp. at 1406-07 ([App. 246-256)], continue." First Report of the Monitor (CD 1898).

437 U.S. 678 (1978), where the Court considered both violation of previous orders and long standing uncontitutional conditions in lock-up, as well as the duration of lock-up confinement (437 U.S. at 685-87) as justifying a district court in Arkansas to enter "a comprehensive order [including a limitation on the duration in which an inmate could be held in lock-up] to ensure against the risk of inadequate compliance." 437 U.S. at 687. See also Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L.J. 635, 694-95 (1982) (incorrectly relied upon by the Ninth Circuit. 801 F.2d at 1089 (App. 22-23)). Cf. United States v. Paradise, ____ U.S. _____, 55 U.S. L.Week 4211, 4217-18, 4220 (No. 85-999 Feb. 25, 1977); id. at 4221 (Powell, J.

concurring); id. at 4222-23 (Stevens, J. concurring).

Similarly, the Ninth Circuit's reliance on Superintendent of Mass. Correctional Institution v. Hill, 472 U.S.____, 86 L.Ed.2d 356 (1985), in fashioning its standard of proof for and judicial review of lock-up decisions (801 F.2d at 1103-06, App. 88-106), raises additional important questions that this Court should address. For like Hewitt, factually and legally Hill is inapposite to the instant case.

In Hill, this Court determined only what standard of proof is required by the Due Process Clause of the Fourteenth Amendment in the regular course of judicial review of a state administrative decision concerning an inmate's loss of good-time, and confinement to isolation for a fixed short term. Further, in Hill

there was no evidence of a pattern of arbitrary decision-making, nor of long standing violations of the Eighth Amendment, nor of long-term confinement in lock-up, nor of repeated violations of past court orders.

As the Ninth Circuit held, plaintiffs have significant liberty interests in freedom from assignment to lock-up. 801 F.2d at 1097-98 (App. 60-68). In Hill this Court reaffirmed "the requirements of due process are flexible and depend on a balancing of the interests affected by the relevant government action." 86 L.Ed.2d at 364. Thus, even if this Court were to apply a due process analysis, the standard of proof and judicial review set forth in Hill (and the limited procedures mandated in Hewitt) do not necessarily apply to

this case. Such a standard depends on context.

Unlike Hill (and Hewitt), the issue in this case is not simply what due process requires, but rather whether the extent of the District Court's authority in formulating a remedy for proven long standing violations of both the Eighth and Fourteenth Amendments to the Constitution and of previous court orders.

In this case, by contrast with Hill, the District Court found that defendants, in the face of the Wright order and the Toussaint preliminary injunction, continue to confine inmates unjustifiably, arbitrarily and capriciously in lock-up units, in which they are subjected to cruel and unusual punishment, "without evidence adequate to establish a reasonable belief that such

inmates present a danger to others or a threat to the security of the institution," 597 F.Supp. at 1407 (App. 252). For example, the District Court found that defendants are not able to identify accurately which inmates are gang members (and subject to lock-up), but rather place and retain alleged gang members in lock-up based on "sketchy" documentation and "confidential information" from sources of "unproven reliability." 597 F.Supp. at 1407 (App. 253).

In this context, this Court should determine what standard of proof and judicial review of lock-up decisions is appropriate under both the Eighth and the Fourteenth Amendments, and a trial court's inherent powers to assure proper compliance with its orders. Hence a Writ

of Certiorari should issue to clarify both Hill and Hewitt.

B. A Writ of Certiorari Should Issue to Resolve a Conflict Between the Ninth and Eighth Circuits as to Proper Application of this Court's Decision in Hewitt.

The Ninth Circuit's decision in this case also conflicts with a decision of the Eighth Circuit with respect to the extent of the procedural safeguards a district court may order when there exists a liberty interest in being free from lock-up. See Clark v. Brewer, 776 F.2d 226 (8th Cir. 1985), affirming and modifying, 578 F.Supp. 1501 (S.D.Iowa 1983).

In Clark, having considered and analyzed this Court's decision in Hewitt v. Helms, the Eighth Circuit upheld certain of the district court's placement and retention procedures that

go significantly beyond those called for by Hewitt, in that inmates in Clark were assigned to "close management" status for indeterminate periods of time. 776 F.2d at 234-236.

In Clark, as in the instant case, the Eighth Circuit identified a liberty interest arising from defendant's administrative regulations. Compare Clark, 776 F.2d at 230-32 with Toussaint, 801 F.2d at 1100-01, 1105-06 (App. 78-83, 97-101). In Clark as in the instant case, but not in Hewitt, lock-up inmates suffered more than just the effect of being "merely transferred from one extremely restricted environment to or even more confined environment." 776 F.2d at 233, quoting Hewitt, 459 U.S. at 473. In Clark as here "at least in some instances an extended period of confinement may have some indirect impact

on parole opportunities and on earning of good time credits" and "inmates in close management have less opportunity to participate in institutional programs." Clark, 776 F.2d at 233. Compare Toussaint, 801 F.2d at 1097-98 (App. 60-69) and 597 F.Supp. at 1405-07 (App. 243-256).

Beyond these similarities, the circumstances in Clark were not as detrimental to the inmates as those in the instant case. In Clark there was no evidence that long term conditions in close management were cruel and unusual or that many inmates are in lock-up for extremely long periods of time. Nor was there any evidence that the defendants persisted over many years in not curing unconstitutional conditions, in unjustifiably and arbitrarily placing inmates in lock-up on the basis of

unreliable information and in violating court injunctions addressing both unconstitutional conditions and due process lock-up placement and retention requirements.

Recognizing the flexibility in due process requirements acknowledged in Hewitt, the Clark Court concluded that they vary depending upon circumstances. 476 F.2d at 232-33. In the circumstances before it, which were not as harsh as in the instant case, the Eighth Circuit favored "in general a relatively informal, nonadversarial procedure...." 776 F.2d at 233.

Even in the less compelling circumstances before it, the Eighth Circuit, by contrast with the Ninth Circuit here, sustained district court imposed procedural requirements that written notice be provided the "close

management" inmates in four types of situations. 776 F.2d 234. Compare 801 F.2d at 1100-01 (App. 78-83). The Eighth Circuit also held that the mere possibility of adverse staff or inmate reaction was not an adequate ground in and of itself to return an inmate in close management. 776 F.2d at 234-35. Compare 801 F.2d at 1100-02 (App. 78-88). Although the Eighth Circuit held that district court was wrong in generally requiring that inmates be entitled to call witnesses in classification proceedings, the Eighth Circuit did impose that requirement "if, since the previous review hearing, an inmate has engaged in conduct that normally would result in disciplinary report, and if that conduct has not yet been addressed in a disciplinary hearing...." 776 F.2d

at 235. Compare 801 F.2d at 1100-01 (App. 78-83).

This Court should issue the Writ of Certiorari to resolve any conflict between the Ninth and Eight Circuits' as to proper application of the Hewitt holding, and the flexibility, depending on context, available to district courts in fashioning remedies for unconstitutional lock-up procedures and conditions.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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